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### Legal Protection against Bad Debtor Who is bound by the Fiduciary Liability Insurance against Auction Conducted by Creditor in Padang City

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#### **Abstract**

The execution of the fiduciary liability insurance, based on the fiduciary liability insurance certificate, has the executive power that is the same as the court decision that has obtained permanent legal force. The right to execute arises since a default occurs by a debtor whose creditor has the right to sell the object of the fiduciary liability insurance on his own power through auction. The purpose of this study was to find out how the execution process of the fiduciary liability insurance carried out by the company to the bad debtor and the form of legal protection against the bad debtor who is bound by the fiduciary liability insurance after the collateral object is auctioned by the creditor. After the auction is conducted, the author is interested in conducting a research discussing on the forms of legal protection against debtor who is bound by the fiduciary liability insurance after the collateral object is auctioned by the creditor. This research applies empirical juridical method by using primary and secondary data. The results of the study found that legal protection for bad debtor, who is bound by the fiduciary liability insurance after the collateral object is auctioned, is the elimination of fiduciary duties on objects guaranteed by fiduciary liability insurance and the return of the remaining credit obtained from the auction by the creditor to the debtor.

**Keywords:** Auction; Debtor; Fiduciary Liability Insurance; Legal Protection

#### **Introduction**

Along with the increasing development activities in our country, the needs of the community have also increased in order to further improve the economy and the performance of their lives. Business competition and the rapid purchase of goods are the main reasons for seeking additional funds so that their businesses are more developed and to improve the performance of their lives. However, limited income greatly prevents them from being able to meet the demands of life in the present.

In starting a business, the community is often hit by limited capital to buy business support equipment and daily life. To support a modern life, the community needs to act quickly in all activities. The community needs a savior to provide those needs. To make it happen, it requires an institution that can accommodate requests in the form of cash handling and the handling of purchases of goods. To do all these things, debts or credit are arising.

A financial institution company is a company that can help meet community needs. The financing institution has an important role with other financial institutions as an alternative institution in terms of financing which also has the potential to support national economic growth in order to realize public welfare in accordance with the mandate of the Pancasila and the 1945 Constitution.

A simple practice in the fiduciary liability insurance is the debtor/ party who has the goods submits financing to the creditor. Then, both parties agreed to use the fiduciary liability insurance for debtor property which was then included in a notary deed. Next, the notary registers it with the fiduciary registration office on the online site of the General Legal Administration Directorate General or abbreviated as (in Indonesia) the Ditjen AHU. In this case, only the notary can and is authorized to register it. The notary is liable for the validity of the deed and guarantees that the fiduciary registration is registered with the fiduciary registration office with evidence of a fiduciary certificate issued by the Ditjen AHU. The notary will print the certificate as proof that the fiduciary has been registered.

Creditors as fiduciary recipients will receive a fiduciary certificate and a copy will be given to the debtor. The fiduciary liability insurance certificate lists the words “FOR JUSTICE BASED ON THE ALMIGHTY GOD”. With the existence of these words, the fiduciary liability insurance certificate has the executive power that is the same as the court decision that has obtained permanent legal force (inclusion).

The executive force in the fiduciary liability insurance certificate is the basis for executing in the form of confiscation and seizure auction without the mediation of a judge. This can be done if the fiduciary giver (debtor) neglects its obligation or breaches the contract in the form of negligence of the fiduciary (debtor) in fulfilling its obligations when the debt is due. In such an event, the fiduciary recipient can carry out the execution of the fiduciary liability insurance object.<sup>1</sup> Negligence here is bad credit or bad loan, i.e. credit that has difficulty in repayment due to factors or elements of intent or because of conditions outside the debtor’s ability. The purpose of the execution is to settle the debtor’s liability through the sale of certain objects belonging to the debtor or the third party providing the guarantee.<sup>2</sup>

Thus, the principle of execution is that the sale of objects/ fiduciary liability insurance objects can be carried out through an auction in public and it is also possible to carry out private sales provided that this is agreed upon by the fiduciary giver and recipient.<sup>3</sup>

After the execution is carried out, in the form of confiscation until the sale stage, the debtor’s debt will be repaid from the sale of the object. After the sale is made, the author is interested in knowing about how legal protection is for bad debtors whose collateral objects have already been auctioned.

## **Research Method**

To obtain a discussion that is in accordance with what is contained in the purpose of compiling the analysis material, this thesis will later use an empirical juridical approach method; i.e. a problem approach through legal research by looking at applicable legal regulations and which will produce theories about the existence and function of law in society. This research also emphasizes the practice in the field which then relates it to the applicable legal or statute aspects regarding the research object to be discussed. Then, it sees the prevailing legal norms and then relates them to the existing fact or reality in society.

This research is descriptive, i.e. research conducted by providing a complete and clear picture of the object of research or the problem to be studied. Then, it is related to the provisions or legislation in force so that finally conclusions can be obtained.

<sup>1</sup> J. Satrio, “*Guaranteed Law, 1991 Material Rights*”, Citra Aditya Bakti, Bandung, page 319.

<sup>2</sup> J. Satrio Op. Cit. page 320.

<sup>3</sup> Gunawan Widjaja and Ahmad Yani, 2007 “*Fiduciary Guarantee*”, PT Raja Grafindo Persada, Jakarta, page 52.

Document study is a technique of data collection carried out by studying library materials and literature. The study of documents in legal research includes legal materials consisting of primary legal materials, secondary legal materials and tertiary legal materials.<sup>4</sup> Interviews in this study were carried out as a process of interaction and communication.<sup>5</sup> The interview is a question and answer session that aims to get information related to the problem. The question and answer sessions were done by first preparing a list of questions that will be asked with related parties regarding legal protection against bad debtors who are bound by the fiduciary liability insurance after the auction is conducted by creditor in Padang City. Normative legal research only recognizes secondary data. So, the management and analysis of legal materials is inseparable from various interpretations known in law. After the data was processed, qualitative data analysis was carried out; i.e. analysis of data that is not in the form of numbers but in the form of sentences that provide a description of the implementation of the law. So that, it can be assessed based on legislation and the views of experts.

## **Research Results and Discussion**

### *1. The Execution Process of Fiduciary Liability Insurance Conducted by Creditor to Bad Debtor*

Initially, the execution of objects pledged as collateral for repayment of the debt must be made through a lawsuit to the District Court. Executions are carried out based on Court Decisions which have permanent legal force. This execution process is known as litigation. Due to the execution of the fiduciary liability insurance, this is recognized as requiring considerable time, effort and cost. Therefore, the Law provides an exception that creditors can execute through public or private auctions on the basis of their own power which is usually known as non-litigation. The execution of the fiduciary liability insurance, based on the fiduciary liability insurance certificate that includes the words “FOR JUSTICE BASED ON THE ALMIGHTY GODS”, has the executive force that is the same as the court decision that has obtained permanent legal force. The right to execution arises from the occurrence of a breach of contract in which the debtor and creditor have the right to sell the fiduciary liability insurance object on their own power through auction as stipulated in Article 29 paragraph (3) letter b of the Fiduciary Liability Insurance Law. The execution itself has been regulated by Law on Notary Position Article 29 paragraph 1 as follows:

- a. The execution of the executorial title by the fiduciary recipient is carried out without the Court's intercession.
- b. The sale of the fiduciary liability insurance object is carried out on the power of the fiduciary's own recipient through a public auction as well as the settlement of the proceeds from the sale.
- c. Private sales based on the agreement of the giver and fiduciary recipient as best as possible to obtain the highest price that benefits the parties.

The principle is that the sale of objects that are objects of the fiduciary liability insurance must go through a public auction. In this way, it is expected that the highest price can be obtained. However, sales through public tenders are not expected to result in the highest prices that are profitable for both fiduciary and fiduciary recipients. Thus, private sales are possible as long as it is agreed upon by the fiduciary giver and fiduciary recipient and the terms of the period of execution of the sale are fulfilled.<sup>6</sup>

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<sup>4</sup> *Ibid.* page 67.

<sup>5</sup> Rooney Hanitijo Soemitro, 1988. *Legal Research and Jurimetry Methodology*, Ghalia Indonesia, Jakarta, page 57

<sup>6</sup> Gunawan Widjaja and Ahmad Yani, 2000, *Fiduciary Guarantee*, PT Raja Grafindo Persada, Jakarta, page 160.

Settlement of bad credit does not always run smoothly. Creditors sometimes have difficulty completing it. The constraints faced by the creditor in resolving bad credit with the fiduciary liability insurance include:

- a. Juridical constraints, i.e. the legal constraints or problems faced by the creditor in connection with the non-fulfillment of laws and regulations concerning the fiduciary liability insurance. Constraints classified as juridical constraints are that not all fiduciary liability insurance was previously registered. Thus, it has a consequence that has detrimental to the creditor since the creditor's position as a fiduciary has weakened. The company will not be a preferred creditor who has the main right to repay debtor's debts if the fiduciary liability insurance is not registered. Then, due to the high awareness of the company, fiduciary registration has become something that must be done on each credit agreement. So, the risk of facing juridical constraints has been resolved until now.
- b. Non-juridical constraints, i.e. constraints outside of the regulatory provisions faced by the company in executing collateral objects. These constraints are the difficulty of banks in executing collateral objects, including:
  - 1) The collateral object disappears or has moved to a third party because it was pawned or rushed by someone else.
  - 2) The company has difficulty confiscating collateral goods due to bad faith from the debtor that hinders the execution process by hiding or transferring the collateral object to another person.<sup>7</sup>

The non-juridical constraints mentioned above arise due to the negligence of the debtor or because of the bad faith from the debtor in submitting the goods which are used as collateral to the creditor for execution. *Parate executie* through court (litigation) is the last resort taken by the creditor to this type of debtor. This execution starts from the creditor's report against the debtor to the police about the violations committed by the debtor and is forwarded to the court. The court ruling issued decisions requiring the debtor to carry out any decisions from the court. However, this step is basically rarely done because of various considerations including costs that are not small, quite a long time, and the rest of the debtor's credit is not proportional to the cost and time to be taken. The execution step through the court will be carried out if the remaining amount of debt is very large and has bad impact for the company.<sup>8</sup>

Companies generally have procedures that they will implement in the execution process. The procedure carried out by the company is based on the Fiduciary Liability Insurance Chapter IV which can be seen from Article 29 to Article 34 which explains the execution of the fiduciary liability insurance object. According to Abdullah Aziz as the Operation Head (OH) of Astra Credit Companies (hereinafter abbreviated as ACC), debtors who have contracts of interest will go through the stages of the company to collect bills that lead to execution if they are unable to pay their debts.<sup>9</sup> This process is in accordance with the rules set by the company without violating the applicable law. The initial steps taken by the company are as follows:

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<sup>7</sup> Budi Untung, 2000, *Banking Loans in Indonesia*, Andi, Yogyakarta, page 1

<sup>8</sup> Interview with Mr. Abdullah Aziz, Operation Head (OH) of Astra Credit Companies (ACC) held on September 21, 2018, at 11:00 West Indonesia Time.

<sup>9</sup> *Ibid.*

- a. Two days before the due date (H-2), ACC will call the debtor to remind them that the debtor will be due in 2 (two) days and remind them to immediately make credit payments.
- b. Notification of late repayment of credit installments is made 1 (one) day after the due date of credit payments both by mail and telephone.
- c. After 7 (seven) days the delay has passed, the debtor will be visited by the Head of Operation Collection who submits the first warning letter.
- d. After waiting for 11 (eleven) days, the Head of Operation Collection comes to the debtor again and submits the second warning letter (SP 2).
- e. After 15 (fifteen) days, if the debtor still has not paid, the third warning letter is issued to warn the debtor that the bill is past due.
- f. On the 30th (thirtieth) day, the debtor will be visited by the ARO Collection whose position is above the Head Operation Collection accompanied by a Power of Attorney (SK) and subpoena automatically issued from the company system. This power of attorney and subpoena is a letter of power of attraction over the object of the fiduciary liability insurance that has expired. Although this letter has been issued, the ARO collection does not automatically make a withdrawal to the debtor. They will go to the debtor who is interested in contracting and approaching, providing solutions and educating. This is useful for creditors to build enthusiasm in fulfilling their responsibilities to the company.
- g. If the approach, education and solutions still cannot help the debtor to fulfill their obligations, precisely after 90 (ninety) days of delay, the withdrawal of debt is left to a third party; i.e. from police assistance in accordance with the directives of Law No. 8 of 2011 and a debt collector with legal status and registered as a member of the collector who is authorized to withdraw from the Financial Services Authority (OJK) by including proof of membership in the form of a certificate of the Indonesian Financial Services Association (APPI) issued by the Financial Services Authority.<sup>10</sup>
- h. Withdrawals by debt collectors can also be done before 90 (ninety) days if the item is moved to another hands. The guarantee law generally provides protection to the creditor if the fiduciary liability insurance object is destroyed. Under Article 1131 of the Civil Code, the debtor is still responsible for their debt to the creditor. However, if the object of guarantee is transferred to a third party, the principle of *droit de suit* applies which is a fundamental feature of material rights; i.e. the principle based on the right of a person who has the right to the object that has the power/ authority to defend or sue the object from anyone's hand or wherever the object is located. If the debtor breach of contract, the creditor can execute the fiduciary liability insurance object in the hands of whoever the object is.
- i. If the fiduciary object is not found, or deliberately removed, the company can carry out the *parate executie* phase through court (litigation). This is done so that the fiduciary object can be found or replaced by the debtor as the party responsible for the fiduciary object.
- j. After the object is confiscated, it is put into the warehouse and ready to be sold.<sup>11</sup> The right to sell the object of the guarantee on its own power is known as *parate executie* which is the right of the fiduciary recipient based on Article 29 paragraph (1) letter b of the Fiduciary Law. This right is reinforced by a promise that must be expressly stated by the fiduciary giver that if the debtor breach of contract, the fiduciary is entitled to sell objects guaranteed through public sales without first obtaining the approval of the District Court as stipulated in Article 15 paragraph (3) Fiduciary Law.

<sup>10</sup> Interview with Mr. Musafri Head of Collector of BFI Finance, held on October 4, 2018, at 1 p.m. West Indonesia Time.

<sup>11</sup> *Ibid*, at 1 p.m. West Indonesia Time.

- k. After the transaction is considered appropriate, the vehicle will be given to the buyer. The feasibility referred to is not the price of the remaining principal debt, but the appropriate is preferred according to the physical condition of the vehicle.

## 2. *Forms of Legal Protection Against Bad Debtors Bound by Fiduciary Liability Insurance After the Collateral Objects are Auctioned by Creditor*

Before the author explains the form of legal protection for bad debtors who are bound by the fiduciary liability insurance after the collateral object is auctioned, the author first describes the basic forms of consumer protection which will be closely related to the results of this research. Related to the theory of legal protection, protection of debtors is important to be carried out in accordance with the directives of the law that regulate as a form of implementation of the theory of legal protection itself. This will guarantee legal certainty for the debtor so that his rights are not ignored by the creditor. The regulations issued by the State as a form of implementation of legal protection can be seen in the Consumer Protection Law (UUPK). UUPK itself explains the purpose of consumer protection in Article 1 paragraph 1 which states that consumer protection is any effort that guarantees legal certainty to provide protection to consumers. This protection is in line with Article 2 of the UUPK that protects consumers based on benefits, justice, balance, consumer safety and security, and legal certainty. In accordance with article 3 of the consumer protection law, the aims are to:

- a. Increase awareness, ability and independence of consumers to protect themselves.
- b. Lifting the dignity of consumers by avoiding the negative excesses of the use of goods and/ or services.
- c. Increase consumer empowerment in choosing, determining and demanding their rights as consumers.
- d. Creating a consumer protection system that contains elements of legal certainty and information disclosure and access to information.
- e. Growing awareness of business actors regarding the importance of consumer protection to foster an honest and responsible attitude in running a business.
- f. Improving the quality of goods and/ or services that ensure the continuity of business in the production of goods and/ or services, health, comfort, safety and security of the consumer.

The objectives outlined in article 3 of the UUPK above are expected to increase awareness of consumer rights and obligations. Article 4 UUPK regulates consumer rights which among them can be drawn from article letter (e) which states about the right to get advocacy, protection, and efforts to resolve consumer protection disputes appropriately. Letter (f) states about the right to obtain consumer guidance and education. Letter (g) is about the right to be treated or served correctly and honestly and not discriminatory. Letter (h) is the right to get compensation and/ or reimbursement, if the goods and/ or services received are not in accordance with the agreement or not as they should.

Law No. 21 of 2011 article 4 letter c states that OJK was formed with the aim of protecting the interests of consumers and the public. Article 28 of the UUOJK also affirms that for the protection of consumers and the public, OJK has the authority to take measures to prevent loss of consumers and the public, including:

- a. Providing information and education to the community on the characteristics of the financial services sector, services and products.
- b. Requesting the Financial Services Institution to stop its activities if the activity has the potential to harm the community.
- c. Other actions deemed necessary in accordance with the provisions of legislation in the financial services sector.

Article 29 states that OJK performs services on customer complaints services which include:

- a. Prepare an adequate device for the service of consumer complaints that are harmed by actors in the Financial Services Institution.
- b. Make a mechanism for complaints of consumers who are harmed by actors in the Financial Services Institution.
- c. Facilitate the resolution of consumer complaints that are harmed by the Financial Services Institution in accordance with the laws and regulations in the financial services sector.

Article 30 paragraph one (1) and two (2) mention:

Paragraph 1. For the protection of consumers and the public, OJK has the authority to carry out legal defense, which includes:

- a. Order or take certain actions to Financial Services Institutions to settle complaints against consumers who have been harmed by Financial Services Institutions.
- b. File a lawsuit:
  - 1) In order to recover assets belonging to the aggrieved party, the party causing the loss that is under the control of the party causing the loss as well as under the control of the other party in bad faith.
  - 2) To obtain compensation from the party causing losses to the consumers and/ or the Financial Services Institution as a result of violations of laws and regulations in the financial services sector.

Paragraph 2 also explains that compensation as referred to in paragraph (1) letter b number 2 is only used for payment of compensation to the injured party.

Furthermore, to provide a strong legal umbrella to protect consumers in the financial services sector, in 2013 the OJK issued regulation No. 1/POJK.07/2013 concerning Consumer Protection of the Financial Services Sector (hereinafter abbreviated as POJKPKSJK). In general, POJKPKSJK consists of 7 Chapters and 57 Articles consisting of Chapter I: General Provisions, Chapter II: Provisions on Consumer Protection in the Financial Services Sector, Chapter III: Consumer Complaints and Provision of Complaint Settlement Facilities by the Financial Services Authority, Chapter IV: Internal Control,

Chapter V: Supervision of Consumer Protection in the Financial Services Sector, Chapter VI: Sanctions, Chapter VII: Transitional Provisions, Chapter VIII: Closing Provisions.

Based on the explanation of the above Law and the relation with UUJF, the financial service/debtor customers that are declared to have bad debt, until the vehicle collections bound by the fiduciary liability insurance are forced to withdraw, also get legal protection. Insurance for bad debtor's vehicles that are bound by the fiduciary liability insurance, as the authors explain in the first discussion, give rise to the requirement for creditors to carry out the mandate as stated in the Fiduciary Liability Insurance Law. In Article 25 paragraph 3, the fiduciary notifies the fiduciary registration office by attaching a statement regarding the abolition of debt, the release of rights, or the destruction of the object that is the object of the fiduciary liability insurance. It was continued with Article 26 paragraph 1 by removing the fiduciary liability insurance as referred to in Article 25, the fiduciary registration office crossed the registration of the fiduciary liability insurance and fiduciary register. Paragraph 2 explains that the fiduciary registration office issues a statement stating that the relevant liability insurance fiduciary certificate is no longer valid.

Legal protection obtained by the debtor also includes returning the excess from the sale of fiduciary objects. The excess from the proceeds of the sale must be returned to the debtor after deducting the required cost during the execution process. Article 34 UUJF paragraph 1 explains that if the execution results exceed the value of the loan, the fiduciary recipient must return the excess to the fiduciary giver.

This order is expressly and clearly ordered to the creditor. However, in its implementation, this return is rarely carried out. In Padang City, these returns are very rare. There are several factors that cause the implementation of Article 34 paragraph 1 does not work properly. The people's ignorance of their rights to the operational costs during the withdrawal process until the execution of the amount is less transparent.

With the presence of OJK with laws relating to the protection of consumers or financial customers, the public is expected to be smarter and bolder in demanding their rights that have been protected by the government through its legal instruments.

## Conclusion

The execution of the fiduciary liability insurance based on the fiduciary liability insurance certificate that includes the words "FOR JUSTICE BASED ON THE ALMIGHTY GODS" has the executive power that is the same as the court decision that has obtained permanent legal force. The right to execution arises from the occurrence of the breach of contract by the debtor. In this case, the creditor has the right to sell the object fiduciary liability insurance for its own power through an auction known as non-litigation. Executing requires a standardized procedure by a company.

If the fiduciary object cannot be executed because the debtor removes or hides the fiduciary object, based on the creditor's report to the police about the violation of the debtor, for example about the wiping out of fiduciary objects, the execution process is carried out through the *parate executie* court, known as litigation.

After the fiduciary object is retrieved, the execution of the fiduciary object is carried out; i.e. an auction where the results will be taken to settle the remaining debtor debts. Legal protection for the debtor whose object has been auctioned is first, the debtor has the right to get the elimination of fiduciary committed by the creditor as an obligation in accordance with the mandate of UUJF. The debtor is entitled to the excess auction results made by the creditor against the debtor's fiduciary object. In its implementation, the return is rarely carried out because of the ignorance of the community on this matter and also because of the deduction of costs incurred by the creditor during the process of executing the auction object.



## ***Suggestions***

In executing the fiduciary liability insurance object, the debtor often does not understand the procedure and execution of the fiduciary liability insurance in accordance with the applicable laws. Preferably, when signing a credit agreement, the creditor should notify or explain to the debtor about the execution of the fiduciary liability insurance object if the breach of contract occurs so that the debtor understands how the execution of the fiduciary liability insurance object is to avoid disputes between creditor and debtor.

Socialization to the public about consumer protection stipulated in the law is necessary; especially for financial sector customers so that they can find out their rights and obligations as consumers of the financial services sector.

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